No. _____

061719 2007

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In The

Supreme Court of the United States

ALICE LARAINE DIMERY,

Petitioner,

v.

ULSTER SAVINGS BANK,

Respondent.

On Petition For A Writ Of Certiorari To The Court Of Appeals, State Of New York

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. When a state provides that an appeal may be taken as of right from a state court judgment or order and the designated court of review refuses and declines to adjudicate and make determination on properly appealed issues, are due process and equal protection guarantees of the Fourteenth Amendment met?

2. Is the state's refusal to adjudicate timely and properly appealed issues a *de facto* denial of the guaranteed "appeal as of right," foreclosing the tolling of the "timeliness clock," and prohibiting a subsequent state determination of "untimely" relative to the appeal?

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PETITION FOR A WRIT OF CERTIORARI

A.L. Dimery respectfully petitions for a writ of certiorari to review the Opinion of the New York State Court of Appeals in this case.

OPINIONS BELOW

Decision and Order of the New York State Court of Appeals filed March 27, 2007 is reported at 8 N.Y.3d 904, 865 N.E.2d 1241, 834 N.Y.S.2d 75 and set forth in the Appendix hereto (App. 1).

Sua Sponte Order of the New York State Court of Appeals filed December 21, 2006 is reported at 860 N.E.2d 987, 7 N.Y.3d 920 and set forth in the Appendix hereto (App. 3).

Decision and Order of the New York State Appellate Division Second Judicial Department filed October 3, 2006 is reported at Slip Opinion No: 2006 NYSlipOp 77036(U) and set forth in the Appendix hereto (App. 8).

Sua Sponte Decision and Order of the Supreme Court of the State of New York Appellate Division, Second Judicial Department dated *August 8, 2006* is reported at Slip Opinion No: 2006 NYSlipOp 73378(U) and set forth in the Appendix hereto (App. 9).

Order of the State of New York Court of Appeals dated November 17, 2005 is reported at 5 N.Y.3d 880, 842 N.E.2d 29, 5 N.Y.3d 880 and set forth in the Appendix hereto (App. 11).

Order of the State of New York Court of Appeals dated July 6, 2005 is reported at 5 N.Y.3d 706, 835 N.E.2d 659, 801 N.Y.S.2d 799 and set forth in the Appendix hereto (App. 12).

Decision and Order on Motion of the Supreme Court of the State of New York Appellate Division, Second Judicial Department dated March 28, 2005, unpublished, (Case No. 2000-10282) and set forth in the Appendix hereto (App. 13). [vacated *Sua Sponte August 8, 2006*]

Decision and Order of the Supreme Court of the State of New York Appellate Division Second Judicial Department dated December 27, 2004 is reported at 13 A.D.3d 574 and 789 N.Y.S.2d 159 and set forth in the Appendix hereto (App. 15).

Decision and Order of the Supreme Court of the State of New York Appellate Division Second Judicial Department dated January 5, 2001, unpublished, and set forth in the Appendix hereto (App. 19).

Decision and Order on Motion and Dismissal of Appeal of the Supreme Court of the State of New York Appellate Division Second Judicial Department dated November 17, 2000, unpublished, set forth in the Appendix hereto (App. 20).

Judgment of the Supreme Court of the State of New York County of Putnam dated and decided October 26, 2000, unpublished, is set forth in Appendix 9-55, original petition No. 05-1063.

Decision and Order of the Supreme Court of the State of New York County of Putnam dated and decided May 19, 2000, unpublished, is set forth in the Appendix 56-86, original petition No. 05-1063.

Decision and Order of the Supreme Court of the State of New York County of Putnam dated June 18, 1993, unpublished, is set forth in the Appendix hereto (App. 24).

BASIS FOR JURISDICTION

The New York State Court of Appeals denied a Motion for reconsideration of the Court's December 21, 2006 dismissal order on March 27, 2007 (App. 1) This petition for a writ of certiorari is filed within ninety days from the entry of the Opinion. Sup. Ct. R. 13.1 The jurisdiction of this Court is invoked under 28 U.S.C. § 1257(a).

CONSTITUTIONAL PROVISIONS INVOLVED

United States Constitutional Amendment XIV:

> Section 1. " . . . nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

STATEMENT OF THE CASE

This case concerns a *de facto* denial of an "appeal as of right" afforded the Petitioner under New York State Consolidated Laws, Civil Practice Law & Rules Article 57, Section 5701,[1] which denial is a deprivation of due process

[1] Section 5701. Appeals to appellate division from supreme and county courts. (a) Appeals as of right. An appeal may be taken to the appellate division as of right in an action, originating in the supreme court or county court: 1. from any final or interlocutory judgment except one entered subsequent to an order of the appellate division which disposes of all the issues in the action; or 2. from an order not specified in subdivision (b), where the motion it decided was made upon notice and it: (i) grants, refuses, continues or modifies a provisional remedy; or (ii) settles, grants or refuses an application to resettle a transcript or statement on appeal; or (iii) grants or refuses a new trial; except where

(Continued on following page)

and equal protection Fourteenth Amendment rights and violative of specific holdings of this Court.

By Decision and Order dated December 27, 2004, App. 15, the New York State Appellate Division, Second Judicial Department, unanimously modified the October 26, 2000 case judgment *Dimery v. Ulster Savings Bank* "on the law" vacating and deleting the eleventh and fourteenth decretal paragraphs and corresponding accountings #2 and #3 "attached to and made part of the judgment," holding that the trial court erred in awarding money judgments of $327,221.98 to the Defendant-Respondent bank and against the Plaintiff-Appellant based on *subjects which did not exist* in the pleadings of the case and *did not exist* in trial on the matter. The court otherwise affirmed the judgment as modified. App. 16

At issue in this Petition is the Appellate Division, Second Judicial Department's refusal and failure to address and render opinion on the validity of the joint venture accounting, accounting #1 also "attached to and

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specific questions of fact arising upon the issues in an action triable by the court have been tried by a jury, pursuant to an order for that purpose, and the order grants or refuses a new trial upon the merits; or (iv) involves some part of the merits; or (v) affects a substantial right; or (vi) in effect determines the action and prevents a judgment from which an appeal might be taken; or (vii) determines a statutory provision of the state to be unconstitutional, and the determination appears from the reasons given for the decision or is necessarily implied in the decision; or (viii) grants a motion for leave to reargue made pursuant to subdivision (d) of rule 2221 or determines a motion for leave to renew made pursuant to subdivision (e) of rule 2221; or 3. from an order, where the motion it decided was made upon notice, refusing to vacate or modify a prior order, if the prior order would have been appealable as of right under paragraph two had it decided a motion made upon notice.

made part of the judgment" and the corresponding decretal paragraphs in the body of the judgment.

The December 27, 2004, Decision and Order of the Appellate Division, Second Judicial Department, frustrates the Petitioner's guaranteed appeal as of right by its failure to address the preserved issues reflected in the joint venture accounting, judgment accounting #1 "attached to and made part of the judgment" and the corresponding decretal paragraphs under which the Petitioner's monies, 18 real properties and personalty were seized without judgment awards or warrants.

Accounting #1 and the corresponding decretal paragraphs on which the Appellate Court refused to make determination effectively awarded to the Defendant-Respondent Ulster Savings Bank $10,000,000.00 in joint venture Pine Manor Subdivision property, $2,000,000.00 in residential property, and permitted the bank to seize $1,000,000.00 in private personalty of the Petitioner without judgment awards or warrants. The property identified as "property" in the judgment is nonexistent real property and in fact is a post office box in a city different from the city location of the real property and personalty seized. App. 9, 11, 12 in original petition 05-1063

Further the alleged "joint venture accounting" accounting #1 is predicated on a December 18, 1984, Contract which *did not exist* in the pleadings of the case and *did not exist* in trial on the matter, forming a pattern of judgment awards concerning subjects which did not exist in pleadings or at trial, as definitively determined by the Appellate Court relative to accountings #2 and #3 and corresponding decretal paragraphs eleven and fourteen which were vacated and set aside.

Additionally, accounting #1 is calculated on the basis of compound interest specifically prohibited by the trial court in its entered interlocutory judgment Decision after part I of a bifurcated trial.[2] The New York State Court of

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[2] "With respect to calculation of interest, plaintiff claims that Ulster furnished accountings based upon simple interest as distinguished from monthly compounded interest. This is confirmatory of plaintiff's testimony that interest was discussed and modified to call for simple interest. Accordingly, *this Court determines that the agreement was in fact modified in this regard to provide for simple rather than compound interest.*"

In overturning the "calculation of interest" determination in the previously entered May 19, 2000 Decision and Order, in violation of C.P.L.R. 5019, the ministerial "guidance" memo states:

> "The agreement on page 2 provides for per diem interest from December 18, 1984 at a per diem rate of $134.97. I gather this would rise slightly for the following month to February 18, 1985 and then be adjusted and prorated to March 1, 1985." "The compounding of interest would cease after August 1, 1985."
>
> "I would think it would be simple annual interest calculated forward from every August first. At the end of each year the unpaid interest would be added to the balance of the debt so that it would draw interest for each following year."
>
> "*I believe this avoids the problem of compounding monthly and it, in effect, is compounding annually which is much fairer.*"

C.P.L.R. 5019 permits the court to correct or cure ministerial mistakes, defects or irregularities which do not affect substantial rights of the parties. *Haggerty v. Market Basket Enterprises, Inc.*, 8 A.D.3d 618 (2nd Dept. 2004). See also, *Herpe v. Herpe*, 225 N.Y. 323 (1919). C.P.L.R. 5019 is not designed to permit the court to exercise discretion or make new findings of fact. Siegel, *New York Practice 4th* § 420.

(*Herpe v. Herpe*, 225 N.Y. 323, 327, 122 N.E. 204, 205).

> "It (the trial court) cannot, by amendment, change the judgment in the matter of substance for error committed on the trial or in the decision, or limit the legal effect of it to meet some supposed equity subsequently called to its attention or subsequently arising. It cannot correct judicial errors

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Appeals has definitively held that a change in an interest rate after entry by a trial court affects a "substantial right" and is a prohibited exercise of appellate jurisdiction.

The record also establishes that the face of the judgment states that the entered interlocutory judgment Decision dated May 19, 2000, was modified by the trial court on August 29, 2000, and again on September 6, 2000; but the case files in the Putnam County Clerk's Office show no such modifications of record. The judgment-roll[3] in the Clerk's files maintains that the judgment flowed directly from the May 19, 2000, interlocutory judgment Decision *without* amendments, again demonstrating a

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> either of commission or omission. Those errors are, under our system of procedure, to be corrected either by the vacating of the judgment or by an appeal." (See, also, *Baum v. Baum*, 40 A.D.2d 1000, 1001, 347 N.Y.S.2d 960, 962.)

Solomon v. City of New York et al., 512 N.Y.S.2d 222, 127 A.D.2d 827 (1987).

> "A court may not amend a judgment if the amendment prejudices a substantial right of a party. (See, *Di Prospero v. Ford Motor Co.*, supra; *Matter of Gould*, 255 App.Div. 433, 434, 8 N.Y.S.2d 714)."

[3] Rule 5017. (b) Content. The judgment-roll shall contain the summons, pleadings, admissions, each judgment and each order involving the merits or necessarily affecting the final judgment. If the judgment was taken by default, it shall also contain the proof required by subdivision (f) of section 3215 and the result of any assessment, account or reference under subdivision (b) of section 3215. If a trial was had, it shall also contain the verdict or decision, any tender or offer made pursuant to rules 3219, 3220 or 3221, and any transcript of proceedings then on file. If any appeal was taken, it shall also contain the determination and opinion of each appellate court and the papers on which each appeal was heard. In an action to recover a chattel, it shall also contain the sheriff's return. In an action on submitted facts under rule 3222, the judgment-roll shall consist of the case, submission, affidavit, each judgment and each order necessarily affecting the final judgment. . . .

pattern of material falsifications in the entered judgment, impacting the validity of accounting #1 and the corresponding decretal paragraphs. The case judgment-roll reports that the trial court *did not* provide "guidance" in the preparation of the accounting as stated on the face of the judgment. "A paper is filed when it is delivered to the proper official and by him [or her] received and filed" (*United States v. Lombardo*, 241 U.S. 73, 76 (1916)). "The object of filing is to deposit the document in a public place so that it may be seen and examined by any person interested, and there can be no filing of a paper in a legal sense except by its delivery to an official whose duty is to file papers and who is required to keep and maintain an office or other public place for their deposit" (*Matter of Stanley v. Board of Appeals of Vill. of Piermont*, 168 Misc. 797, 800 (1938)).

The entered judgment contradicts both the May 19, 2000 interlocutory judgment Decision and the alleged nonentered "guidance" note of August 29, 2000. No records whatsoever exist as to what is included in the alleged "guidance" of September 6, 2000, holdings of which are reflected in accounting #1 according to language on the face of the judgment. App. 10 in original petition 05-1063

The Petitioner does not ask the Court to sort through this morass. Rather, the Petitioner respectfully asks the Court to set aside the judgment as modified and remand the case to the New York State Courts with instruction to address and render written opinion on the final remaining judgment accounting #1 and its corresponding decretal paragraphs and determine their compliance or noncompliance with New York State law, as repeatedly requested throughout the appellate process, but ignored by the State Courts to the material prejudice of the Petitioner in a

deprivation of constitutional due process and equal protection constitutional guarantees.

PROCEEDINGS IN THE U.S. SUPREME COURT AND THE STATE COURTS

This is a second Petition for a Writ of Certiorari submitted to the Court for consideration in the case, *Dimery v. Ulster Savings Bank*. On or about February 15, 2006, Petitioner sought a *writ of certiorari*, which was denied by this Court on or about April 24, 2006.

Subsequently, on August 2, 2006, the New York State Appellate Division, Second Judicial Department, determined that due to an inexplicable record irregularity, the court had previously denied a motion to reargue by the Respondent-Appellant Ulster Savings Bank, not that of the Appellant-Respondent Dimery and did grant to Dimery a 30-day period pursuant to statute in which to submit a new motion to reargue. On August 30, 2006, Petitioner Dimery filed a timely motion to reargue, pursuant to instructions of the court. The Dimery papers and Opposition papers by Ulster Savings Bank were accepted by the Appellate Division, Second Judicial Department. *On October 3, 2006*, the Second Judicial Department denied Petitioner Dimery's motion to reargue.[4] App. 8

[4] For unknown and inexplicable reasons during the period granted by statute for the submission of Petitioner Dimery's motion to reargue, the Second Judicial Department on August 8, 2006, not only vacated its prior March 28, 2005, motion denial decision determined to reflect "an explicable record irregularity," the Second Department *sua sponte* entered a new decision dated August 8, 2006, which denied a January 31, 2005, "motion to reargue." Previously, on August 2, 2006, the Second

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Department had determined that it could not know "with certainty" which motion to reargue was referenced in its deliberations leading to its March 28, 2005, denial decision.

Though not an issue on petition before this Court, this action would appear to be contrary to the decision of the United States Court of Appeals for the Sixth Circuit in *Scott v. Collins*, 286 F.3d 923 (2002) in which the Court reversed a District Court's Decision. Originally a state case, after repeated rejections by Ohio Courts the case was taken into the federal court system.

The question before the court was whether the district court properly applied the statute of limitations to one Scott's habeas petition before the court. The Court of Appeals found that the Respondent did not plead the statute of limitations defense and waived such defense. The Court then addressed the District Court's authority to *sua sponte* assert the statute of limitations defense. The Court of Appeals concluded that while the District Court dismissal of a habeas petition as an initial matter (after notice and opportunity to be heard) does not amount to cure *sua sponte* a party's waiver of an affirmative defense, a court "commits error when it cures one party's waiver by ruling *sua sponte*." *Edwards v. Armstrong*, No. 93-5665, 1995 WL 390279 at *7 (6th Cir. June 30, 1995).

The Court of Appeals states in the *Scott Collins* Decision that a court does not have "continuing power to dismiss *sua sponte* the case after the court orders respondent to file and answer." In this civil proceeding the court has "the ability to dismiss habeas petitions *sua sponte* but that ability expires when the judge orders a respondent to file an answer or take other appropriate action."

In relevant part, the Appellate Court did err in *sua sponte* substituting the August 8, 2006, Decision for the March 28, 2005, Decision vacated during the term that the court had given the Petitioner to submit a new and timely motion to reargue. This in effect amounted to a prejudicial curing of a record "irregularity" violative of *equal protection* constitutional guarantees.

Upon vacation of the March 28, 2005, Decision the next *valid* Decision entry by the Appellate Court is the October 3, 2006 Decision which denies the Appellant's motion to reargue or in the alternative leave to appeal to the Court of Appeals. Though the language of the decision states that it is a motion to reargue a motion to reargue this language is misleading and inaccurate. The motion to reargue was entertained by the court because the record "irregularity" established that the court could not ascertain with absolute certainty in fact which

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As prescribed by New York State statute, Petitioner filed a notice of appeal to the New York State Court of Appeals via the Supreme Court of original jurisdiction on October 31, 2006.

On November 3, 2006, the Court of Appeals acknowledged receipt of the notice of appeal and instructed Petitioner Dimery to file a Preliminary Appeal Statement with all attachments as required by section 500.9 of the court's Rules of Practice. App. 6

By letter dated November 15, 2006, the Court of Appeals notified the Petitioner that the Preliminary Appeal Statement had been received. The Petitioner was advised that *sua sponte* the court would examine (1) whether a substantial constitutional question is directly involved to support an appeal as of right to the Court of Appeals and (2) whether the appeal was timely taken. To preserve the appeal, the Petitioner was further instructed to

> serve and file within ten days after this letter's date your comments in letter format justifying

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reargue motion was entertained by the court prior to the March 28, 2005, Decision on Motion.

The record clearly establishes on the face of the Notice of Motion that no fee was paid and that the submitted motion was treated by the appellate court as one to reargue *not* one to reargue a previous reargument. It would appear that a procedure to properly correct a record irregularity has itself turned into a record irregularity to the continued prejudice of the Petitioner.

If the bank were aware of the irregularity and failed to notify the Court, this would suggest "irregularity." Counsel for the Respondent is a sophisticated firm with vast systems of checks and balances. The Respondent bank has never denied its knowledge of the record irregularity. Respectfully, the Court cannot properly accord any credence to its "clerical error" claims in light of its record failure to correct the alleged "clerical error."

> the retention of subject matter jurisdiction. Also please enclose a copy of each brief filed by each party in the Appellate Division, as well as a copy of the record on appeal or appendix filed in that court.

App. 4 Opposition papers from Ulster Savings Bank were invited to be submitted within the referenced 10-day period. Timely filings were submitted by both parties.

By Order dated December 21, 2006, the New York State Court of Appeals *sua sponte* dismissed the Petitioner's appeal "upon the *ground* that it is untimely (see C.P.L.R. 5513[a]." [emphasis added] App. 3 The Court of Appeals stated a single ground for dismissal. The Court's investigation of (1) whether a substantial constitutional question is directly involved to support an appeal as of right would appear to have been answered "Yes."

On or about January 19, 2007, the Petitioner submitted a motion pursuant to 22 N.Y.C.R.R. 500.21(d)(3) to reargue, resettle and amend the Decision & Order of the Court dated and entered December 21, 2006, or in the alternative to evoke jurisdiction of the New York State Court of Appeals under timeless and perpetual inherent power of the Court to police and control its affairs and protect from the practice of fraud upon the court, requesting in part compensation for the bank's removal of $1,000,000.00 in goods from Petitioner's premises without judgment award or warrant and a $10,000,000.00 court bond from the Respondent to protect against further loss from surreptitious seizures of joint venture Pine Manor subdivision lands and dwellings, owned of record by the Petitioner.

On or about February 1, 2007, the Respondent Ulster Savings Bank submitted opposition papers to the Petitioner's motion to reargue and cross motioned for costs and

sanctions, including an order from the Court of Appeals barring the Petitioner from "any further actions, appeals or motions to reargue concerning the subject matter of this case. . . ."

By Order dated March 27, 2007, the New York State Court of Appeals held, (1) "motion for reconsideration of this Court's December 21, 2006 dismissal order . . . is denied" (2) "the said cross motion for the imposition of sanctions be and same hereby is denied." App. 3

This Petition for a writ of certiorari followed.

REASONS FOR GRANTING THE WRIT

I. The *sole* issue presented for consideration by the Court is the constitutionality of the State's acceptance of timely appeal as of right submissions and then declining to render opinion and make determinations on material, preserved issues affecting the validity of the judgment.

II. The posture is a *de facto* denial by the State of a guaranteed right to appeal, affording the right to some and discriminatorily denying the right to others, contravening the explicit holdings of the United States Supreme Court.

North Carolina v. Pearce, 395 U.S. 711, 89 S.Ct. 2072, 23 L.Ed.2d 656 (1969).

> This Court has never held that the States are required to establish avenues of appellate review, but it is now fundamental that, once established, these avenues must be kept free of unreasoned distinctions that can only impede open and equal

> access to the courts. *Griffin v. Illinois*, 351 U.S. 12, 76 S.Ct. 585, 100 L.Ed. 891; *Douglas v. California*, 372 U.S. 353, 83 S.Ct. 814, 9 L.Ed.2d 811; *Lane v. Brown*, 372 U.S. 477, 83 S.Ct. 768, 9 L.Ed.2d 892; *Draper v. Washington*, 372 U.S. 487, 83 S.Ct. 774, 9 L.Ed.2d 899; *Rinaldi v. Yeager*, 384 U.S. 305, 310, 311, 86 S.Ct. 1497, 1500-1501, 16 L.Ed.2d 577.

Lindsey v. Normet, 405 U.S. 56 (1972).

> When an appeal is afforded, however, it cannot be granted to some litigants and capriciously or arbitrarily denied to others without violating the Equal Protection Clause. *Griffin v. Illinois*, supra; *Smith v. Bennett*, 365 U.S. 708 (1961); *Lane v. Brown*, 372 U.S. 477 (1963); *Long v. District Court of Iowa*, 385 U.S. 192 (1966); *Gardner v. California*, 393 U.S. 367 (1969). Cf. *Coppedge v. United States*, 369 U.S. 438 (1962); *Ellis v. United States*, 356 U.S. 674 (1958).

Ross v. Moffitt, 417 U.S. 600, 94 S.Ct. 2437, 41 L.Ed.2d 341 (1974).

> Due process 'emphasizes fairness between the State and the individual dealing with the State, regardless of how other individuals in the same situation may be treated. Equal protection,' on the other hand, emphasizes disparity in treatment by a State between classes of individuals whose situations are arguably indistinguishable.
>
> The Fourteenth Amendment 'does not require absolute equality or precisely equal advantages,' *San Antonio Independent School District v. Rodriguez*, 411 U.S. 1, 24, 93 S.Ct. 1278, 1291, 36 L.Ed.2d 16 (1973), nor does it require the State to 'equalize economic conditions.' *Griffin v. Illinois*,

351 U.S., at 23, 76 S.Ct., at 592 (Frankfurter, J., concurring). It does require that the state appellate system be 'free of unreasoned distinctions,' *Rinaldi v. Yeager*, 384 U.S. 305, 310, 86 S.Ct. 1497, 1500, 16 L.Ed.2d 577 (1966).

III. This Court has stated that the deprivation of property interests without *due process* becomes an issue of federal constitutional law when the State's procedures for correcting the denial and affording the aggrieved *due process* fail to do so.

A core issue before the State appellate court was: Whether a judgment rendered in part II of a bifurcated trial, premised on the holdings of a not of record series of amendments, modifications, changes and additions to the determinations of the entered Decision and Order in part I, violative of C.P.L.R. 5019 and without trial in the matter is enforceable as an assignment of liability consistent with constitutional due process and equal protection guarantees. The appellate court was specifically asked to make determination on the change in the 'interest rate' from simple in the entered interlocutory judgment Decision and Order dated May 19, 2000, to compound and simple compounded annually in the entered judgment as affecting a substantial right of the Appellant.

The determination properly and timely sought on appeal was not one which the appellate court had discretion to ignore. The New York State Court of Appeals has decisively concluded that a change in an interest rate by a trial court is violative of C.P.L.R. 5019 and affects a substantial right.

Pjetri v. New York City Health and Hospitals Corp., 571 N.Y.S.2d 934, 169 A.D.2d 100 (N.Y.A.D. 1 Dept., 1991)

> A court's inherent power to exercise control over its judgment is not plenary, and should be resorted to only to relieve a party 'from judgments taken through [fraud,] "mistake, inadvertence, surprise or excusable neglect"' (*Ladd v. Stevenson*, 112 N.Y. 325, 332 [19 N.E. 842] (*McKenna*, supra, 61 N.Y.2d at 741-42, 472 N.Y.S.2d 913, 460 N.E.2d 1348). . . .
>
> Thus, once a judgment entitles a litigant to recover interest at a particular rate any litigation directed at modifying the judgment to alter that rate must be viewed as affecting a substantial right. Such litigation then cannot be accommodated within the permission of C.P.L.R. 5019(a).
>
> If there were any doubt in this regard, it ought to be dispelled by the determination of the Court of Appeals in *Matter of the City of New York v. Roteeco Corp.*, 33 N.Y.2d 970, 353 N.Y.S.2d 736, 309 N.E.2d 135. There, the Roteeco [169 A.D.2d 105] Corporation, a claimant in condemnation proceedings, was awarded interest in a partial final decree at a rate of four percent. No appeal was taken. Some two years subsequent to the partial final decree, however, the Court of Appeals in a different matter (*Matter of City of New York [Manhattan Civic Center Arena]*, 27 N.Y.2d 518, 312 N.Y.S.2d 995, 261 N.E.2d 106) held that the proper rate of interest for the period covered by the Roteeco decree was six percent. Roteeco then moved pursuant to C.P.L.R. 5019(a) to amend the decree to increase the rate of interest on the fee award made in the decree by two percentage points. In affirming the denial of the motion the Court of Appeals held, "[B]oth partial decrees,

> from which claimants took no appeal, became final and the trial court had no jurisdiction to alter its decree in any matter of substance (citations omitted)" (*Roteeco*, supra, at 972, 353 N.Y.2d 736, 309 N.E.2d 135). Underscoring the fact that it considered the proposed amendment of the interest rate to concern a matter of substance, the Roteeco court cited to *Herpe v. Herpe*, 225 N.Y. 323, 327, 122 N.E. 204, where the following particularly relevant passage may be found: "[T]he rule has long been settled and inflexibly applied that the trial court has no revisory or appellate jurisdiction to correct by amendment error in substance affecting the judgment. It cannot, by amendment, change the judgment in matter of substance for error committed on the trial or in the decision, or limit the legal effect of it to meet some supposed equity subsequently called to its attention or subsequently arising. It cannot correct judicial errors either of commission or omission. Those errors are, under our system of procedure, to be corrected either by the vacating of the judgment or by an appeal."

The record establishes that relative to the critical preserved issue of the trial court's assumption of appellate or revisory jurisdiction, specifically prohibited by C.P.L.R. 5019, amplified and definitively clarified in the landmark ruling in *Herpe v. Herpe*, repeatedly affirmed by the New York State Court of Appeals, the Appellant has in fact been denied her right to appeal, and that the time to appeal has not elapsed because the core appellate issue has not been addressed by the court of review.

The Supreme Court of the State of New York is a statewide court of unlimited original general jurisdiction (N.Y. Const., art. 6, § 7(a)); however, New York State law

[C.P.L.R. 5019] clearly establishes that the Supreme Court does not possess appellate or revisory jurisdiction. Appellate courts and the New York State Court of Appeals have definitively ruled that the trial court does not possess jurisdiction to change a previously determined interest rate and to do so affects a substantial right.

Morrison v. Budget Rent A Car Systems, Inc., 657 N.Y.S.2d 721, 230 A.D.2d 253 (N.Y.A.D. 2 Dept., 1997)

> In New York, the authority of the courts to adjudicate classes of cases derives ultimately from article VI of the New York Constitution. The constitutional limits that are placed upon particular courts define their authority and, hence, their subject matter jurisdiction, so that no New York court may exercise powers beyond those granted by the New York Constitution and the implementational statutes (see, e.g., *Lincoln First Bank v. Sanford*, 173 A.D.2d 65, 579 N.Y.S.2d 781; *Wikarski v. State of New York*, 91 A.D.2d 1174, 459 N.Y.S.2d 143; *Matter of Walker v. Walker*, 86 N.Y.2d 624, 629, 635 N.Y.S.2d 152, 658 N.E.2d 1025; *Marine Midland Bank v. Bowker*, 89 A.D.2d 194, 456 N.Y.S.2d 243, affd., 59 N.Y.2d 739, 463 N.Y.S.2d 441, 450 N.E.2d 247; *Matter of Byrnes v. County of Monroe*, 122 A.D.2d 549, 505 N.Y.S.2d 473).
>
> Even the New York State Supreme Court, which has been called a court of general "unlimited and unqualified jurisdiction" (*Matter of Fry v. Village of Tarrytown*, supra, at 718, 658 N.Y.S.2d 205, 680 N.E.2d 578 quoting *Kagen v. Kagen*, 21 N.Y.2d 532, 537, 289 N.Y.S.2d 195, 236 N.E.2d 475; see also, *Murphy v. Milonas*, 234 A.D.2d 109, 650 N.Y.S.2d 729) may not entertain actions over which it lacks subject matter jurisdiction

(see, e.g., *Matter of Schulz v. State of New York*, 86 N.Y.2d 225, 630 N.Y.S.2d 978, 654 N.E.2d 1226, cert. denied, 516 U.S. 944, 116 S.Ct. 382, 133 L.Ed.2d 305; *Nominee Realty v. State of New York*, 233 A.D.2d 426, 650 N.Y.S.2d 281).

This is a material issue and the failure of the appellate court to address the matter is unconstitutional and a denial of a right to appeal, which improper denial *cannot* stop the clock on timeliness of the appeal and arbitrarily, capriciously and discriminatorily deny Appellant the right to a determination. If a State provides the right to appeal, then the appeal process cannot constitutionally be a sham proceeding.

IV. The Record establishes that the issues sought to be adjudicated on appeal have been properly preserved and presented to the Appellate Courts for Review, yet repeatedly ignored by the State Courts.

The Appellate Division understood and apprehended that the affirmed judgment awards money and property to the Respondent bank against the Plaintiff-Appellant under the terms and conditions of a December 18, 1984, Contract not in existence in trial on the matter, contravening the trial courts filed Decisions and Orders dated June 18, 1993, and May 19, 2000. (App. 24 and App. 56 in original petition 05-1063)

> The judgment issued by the trial court, below, awards money and property to the Respondent [bank] under an accounting for a "December 18, 1984 contract." Such an agreement was never the subject of the trial between the parties. There was never any December 18, 1984 contract signed, seen or adopted by the Appellant and the

entirety of trial court's determinations, during trial involved a March 1, 1985 Agreement. No evidence was offered of an alleged liability of the Appellant under a December 18, 1984 contract, and nothing in the subject matter before the trial court addressed an agreement with the date of December 18, 1984. The judgment, with its included accounting utilized for its final entry, radically alters the arrangement between the Respondent [bank] and the Appellant. [Affirmation in Support of Order to Show Cause December 20, 2000 Appellate Division, Second Judicial Department].

Lack of Phase II trial record

At each step after the Decision and Order, without any particular records being established for its determinations, the trial court did not merely correct clerical errors – it made several determinations which altered its own Decision and Order and materially affected a substantial right of the Appellant. The judgment being appealed is the embodiment of various inconsistencies and practical additur of liability against the Appellant, without any legal basis. [Affirmation in Support of Order to Show Cause, dated December 20, 2000 page 11 Appellate Division, Second Judicial Department]

. . . The trial court issued determinations which materially contradicted and amended the Decision and Order. Neither party waived its rights to submit documentation or make legal arguments to the court at that time. [Ibid. page 9]

Relative to the judgment "guidance" alleged to have been provided by the court on September 6, 2000, the only written record addressing the issue or suggesting content

is the following statement made by counsel for the Appellant in a brief before the appellate court describing the runaway and chaotic state of affairs at this juncture of the case proceedings:

Denial of the right to be heard

> . . . the court, via a correspondence dated August 29, 2000, issued determinations addressing the issues posed by counsel for the parties *before* the conference date [September 6, 2000] and without the opportunity for respective trial counsel to make any factual or legal arguments. . . Those determinations were divergent from those in the trial court's original Decision and Order. . . On September 6, 2000 wherein the court gave further directions at odds with the determinations or modifications to both the Decision and Order and its [August 29, 2000 correspondence.] By correspondence to the Court dated *October 12, 2000*, the Respondent [bank] "asserted additional liabilities due it from the Appellant" not included in the Decision and Order or the August 29, 2000 correspondence. . . . [emphasis added] [Affirmation in Support of Order to Show Cause, dated December 20, 2000 page 7 Appellate Division, Second Judicial Department]

An examination of the determinations of the trial court in the May 19, 2000, Decision and Order, and a review of the August 29, 2000, "guidance" memo provide prima facie evidence that on October 12, 2000, the Respondent bank *overturned* all established and purported material court determinations, by letter order to the trial court. The final case judgment against the Petitioner is exclusively the private adjudication of the Respondent bank, clearly without jurisdiction. The letter *informs the*

court that the Respondent bank has adjudged the matters and its determinations and holdings issue forth in the accompanying judgment.

In *People v. Kelly,* 5 N.Y.3d 116, 832 N.E.2d 1179, decided June 29, 2005, the New York State Court of Appeals identified this issue as a "mode of proceedings" error that affects the essential validity of the judicial process.

> Defendant relies principally on *People v. Ahmed* (66 N.Y.2d 307 [1985]). There, we held that a judge who delegated away an essential judicial function compromised the very organization of the court and the lawful mode of proceedings. The error, although unprotested, presented a question of law enabling this court to review the claim. Because the ailing trial judge directed his law clerk to answer questions posed by a deliberating jury, this Court reversed the conviction, even though Ahmed had consented to the procedure. Ordinarily, preservation is essential to the exercise which is limited to the review of questions of law (N.Y. Const., art. VI, § 3[a]; see also Karger, Powers of the New York Court of Appeals § 137 at 787 [3d ed]). Nevertheless, *in a very narrow category of cases, we have recognized so-called "mode of proceedings" errors that go to the essential validity of the process and are so fundamental that the entire trial is irreparably tainted* (*see generally People v. Agramonte,* 87 N.Y.2d 765, 770 [1996]). Errors within this tightly circumscribed class are immune from the requirement of preservation. Outside the context described by these cases, however, we have repeatedly held that a court's failure to adhere to a statutorily or constitutionally grounded procedural protection does not relieve the defendant of the obligation to protest. [emphasis added]

The Respondent bank's October 12, 2000, letter App. 27 to the court and the attached final judgment *adjudge, order* and *decree* the following among other revisions:

A. *Three accountings* shall be included in the stead of the one ordered by the court. *(Two of which have been vacated.)*

B. A December 18, 1984 Contract shall be the basis of the joint venture judgment accounting in the stead of the March 1, 1985 Agreement held by the court to be the subject of trial. *(Appellate Court refused and declined to address issue.)*

C. No transactions transpired between the parties on March 1, 1985 overruling the court's entered holdings that the subject relationship of the parties was established on that day. *(Appellate Court refused and declined to address issue.)*

D. The parties' joint venture became effective on December 18, 1984 not March 1, 1985 as determined by the court. *(Appellate Court refused and declined to address issue.)*

E. The joint venture accounting to be attached to and made part of the judgment (accounting #1) would run for *an additional nine and one-half years* from December 18, 1984 to October 1, 2000 overruling the court's determination that the venture was established on March 1, 1985 and ended on March 26, 1991, and that *the Appellant would be charged compound interest* for this additional decade of time. *(Appellate Court refused and declined to address issue.)*

F. The petition in the consolidated summary holdover proceeding would be granted, overruling the court's Decision and Order determination that no landlord tenant relationship existed between the parties, and that the allegation of the Respondent to that effect was a false allegation. *(Appellate Court refused and declined to address issue.)*

G. The bank's counterclaim would be granted for possession of Route 6 N, Mahopac Falls, NY 10542, an award of a New York State Road not in existence in trial on the matter, and arguably not in possession of the Appellant and that the designation address of this award would not appear on the face of the judgment. *(Appellate Court refused and declined to address issue.)*

H. The Appellant would be assessed for tax payments not in existence in trial on the matter. *(vacated)*

I. The Appellant would be assessed for "rent due" during the term of the joint venture to October 1, 2000 overturning the court's entered Decision and Order which held that to be prohibited. *(vacated)*

In the October 12, 2000, letter the Respondent bank informed the court that its determinations had been forwarded to counsel for the Appellant, and that the judgment would be submitted for the court's expected signature. On October 26, 2000, the trial judge affixed his signature to this false instrument under false pretense that the document represented the determinations of the court in compliance with C.P.L.R. 5011 to the material and continuing prejudice and damage of the Appellant.

V. The Court should determine the constitutionality of a State's refusal to adjudicate a first appeal as of right and the subsequent dismissal of the appeal as "untimely"

Reynolds v. Stockton, 140 U.S. 254, 11 S.Ct. 773, 35 L.Ed. 464 (1891) cited in *Connolly v. Bell*, 141 N.Y.S.2d 753, 286 A.D. 220 (N.Y.A.D. 1 Dept., 1952).

> Here, not only was "[t]he trial judge's action . . . not authorized by law . . . ," *Seidel*, 39 S.W.2d at 225, the action was specifically prohibited by statute.

Standard Oil Co. of Indiana v. State of Missouri ex inf. Hadley, 224 U.S. 270, 32 S.Ct. 406, 56 L.Ed. 760 (1912).

> The due process guaranteed by the Fourteenth Amendment is satisfied when the judgment does not go beyond that to which the [prevailing party] was entitled on the facts pleaded and proved.

In this case the record establishes that the judicial abdication of the court and the improper assumption of jurisdiction by the Respondent have been serially and properly protested. The judgment-roll further confirms that during the period of the Respondent bank's process to judgment, the trial court had in fact lost jurisdiction of the case because of the Appellant's Appeal to the Appellate Division taken on September 7, 2000. The appeal and cross appeal by the Respondent concerned the May 19, 2000, interlocutory judgment labeled "Decision and Order" following the "guidances" of August 29, 2000, and September 6, 2000.

On October 15, 2000, the Appellant made application for a stay of the case proceedings on the grounds among

others that the judgment would be suspect because of the August 29, 2000, and September 6, 2000, "guidances" which overturned the entered Decision of the court.

Thus, even without relinquishing jurisdiction to the Respondent, the trial court could not properly proceed to judgment on October 26, 2000. The Appellate Division's determination of dismissal was not received until November 17, 2000. App. 20 State and federal rules are comparable on this issue. The general rule is that once a notice of appeal has been filed, the lower court loses jurisdiction over the subject matter of the appeal. Moore's Federal Practice, 2d ed., ¶ 203.11, pp. 734-36:

> "The filing of a timely and sufficient notice of appeal has the effect of immediately transferring jurisdiction from the district court to the court of appeals with respect to any matters involved in the appeal. . . . Thus, after a notice of appeal is timely filed, the district court has no power to vacate the judgment, or to grant the appellant's motion to dismiss the action without prejudice, or to allow the filing of amended or supplemental pleadings."

Elliot v. Piersol, 1 Pet. 328, 340, 26 U.S. 328, 340 (1828):

> "Without authority . . . judgments and orders are regarded as nullities. They are not voidable, but simply void; and form no bar to a recovery sought, *even prior to a reversal* in opposition to them. They constitute no justification; and all persons concerned in executing such judgments or sentences, are considered, in law, as trespassers." [emphasis added]

The entry, enforcement and affirmation of the case judgment after modification, by the Appellate Division, Second Judicial Department, violate the constitutional *due process* and *equal protection* Fourteenth Amendment rights of the Appellant.

CONCLUSION

For all of the reasons set forth herein, the petition for a writ of certiorari should be granted, the appeal reinstated, the judgment below as appealed from should be reversed in its entirety and the case remanded to the State court for appellate review and determination of the matters properly and timely previously raised on appeal affording the Petitioner the "appeal as of right" provided by New York State statutes, thus far unconstitutionally denied.

Respectfully submitted,

A.L. DIMERY
Box 338
Mahopac Falls, NY 10542
(845) 628-1320

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State of New York,
Court of Appeals

At a session of the court, held at Court of Appeals hall in the City of Albany on the twenty-seventh ***day of*** March 2007

Present, HON. JUDITH S. KAYE, *Chief Judge, presiding.*

Mo. No. 207

Alice Laraine Dimery,

Appellant,

v.

Ulster Savings Bank,

Respondent.

A motion for reconsideration of this Court's December 21, 2006 dismissal order in the above cause having heretofore been made upon the part of the appellant herein and a cross motion for the imposition of sanctions in the above cause having heretofore been made upon the part of the respondent herein, papers having been submitted on the motion and cross motion and due deliberation having been thereupon had, it is

ORDERED, that the said motion for reconsideration of this Court's December 21, 2006 dismissal order be and the same hereby is denied; and it is

ORDERED, that the said cross motion for the imposition of sanctions be and the same hereby is denied.

/s/ Stuart M. Cohen
Stuart M. Cohen
Clerk of the Court

State of New York,
Court of Appeals

At a session of the court, held at Court of Appeals hall in the City of Albany on the twenty-first ***day of*** December 2006

Present, HON. JUDITH S. KAYE, *Chief Judge, presiding.*

Mo. No. 1372 SSD 79

Alice Laraine Dimery,
Appellant,

v.

Ulster Savings Bank,
Respondent.

The appellant having filed notice of appeal in the above title and due consideration having been thereupon had, it is

ORDERED, that the appeal be and the same hereby is dismissed without costs, by the Court *sua sponte*, upon the ground that it is untimely (*see* CPLR 5513[a]).

/s/ Stuart M. Cohen
Stuart M. Cohen
Clerk of the Court

[LOGO]

State of New York
Court of Appeals

Stuart M. Cohen
Clerk of the Court

Clerk's Office
Albany, New York 12207-1095

November 15, 2006

Ms. Alice Laraine Dimery
Box 338
Mahopac Falls. New York 10542

Re: *Dimery v. Ulster Savings Bank*

Dear Ms. Dimery:

The Court has received your Preliminary Appeal Statement and will examine its subject matter jurisdiction with respect to whether a substantial constitutional question is directly involved to support an appeal as of right and whether the appeal was timely taken. This examination of jurisdiction shall not preclude the Court from addressing any jurisdictional concerns in the future.

This communication is without prejudice to any motion any party may wish to make. If you conclude that the order is not appealable as of right, please arrange for the execution of a stipulation signed by all counsel consenting to a dismissal of the appeal (see section 500.8[a] of the Court of Appeals Rules of Practice) and transmit that paper to my office. If a stipulation is forthcoming, please inform the Clerk's office immediately.

On the other hand, if you wish to persevere in the appeal, you should serve and file within ten days after this letter's date your comments in letter format justifying the retention of subject matter jurisdiction. Also please enclose a copy of each brief filed by each party in the Appellate

Division, as well as a copy of the record on appeal or appendix filed in that court.

By copy of this letter, your adversary is likewise afforded the opportunity to comment in writing on the subject matter jurisdiction within the same ten day period after this letter's date.

The times within which briefs on the merits must be filed are held in abeyance during the pendency of this jurisdictional inquiry. If this inquiry is terminated by the Court, the Clerk will notify counsel in writing and set a new schedule for the perfecting of the appeal.

If you have any questions regarding this letter, you may contact Susan Dautel (518-455-7701) or Marcus Mastracco (518-455-7702).

Very truly yours,

/s/ Stuart M. Cohen
Stuart M. Cohen

SMC/ai

cc: Thacher Proffitt & Wood, LLP

[LOGO]

State of New York
Court of Appeals

Stuart M. Cohen
Clerk of the Court

Clerk's Office
Albany, New York 12207-1095

November 3, 2006

Ms. Alice Laraine Dimery
Box 338
Mahonac Falls. New York 10542

Re: *Dimery v. Ulster Savings Bank*

Dear Ms. Dimery:

The Putnam County Clerks's office has forwarded to this office a copy of a notice of appeal dated October 31, 2006.

Please file with this Court an original and copy of a Preliminary Appeal Statement with all attachments and proof of service of one copy on each other party, as required by section 500.9 of this Court's Rules of Practice.

Very truly yours,

STUART M. COHEN

/s/ Susan Dautel
Susan S. Dautel
Assistant Deputy Clerk

SSD/ml

cc: Thacher Proffitt & Wood, LLP

Supreme Court of the State of New York
Appellate Division: Second Judicial Department

M45365
Y/sl

ANITA R. FLORIO, J.P.
GABRIEL M. KRAUSMAN
GLORIA GOLDSTEIN
WILLIAM F. MASTRO, JJ.

2000-10282

Alice Laraine Dimery,
appellant-respondent,
v Ulster Savings Bank,
respondent-appellant.

(Index No. 230/93)

DECISION & ORDER
ON MOTION

Motion by appellant-respondent on an appeal from the judgment of the Supreme Court, Putnam County, entered October 26, 2000, which was determined by decision and order dated December 27, 2004, for leave to reargue a prior motion for leave to reargue the appeal which was determined by decision and order on motion of this court dated August 8, 2006, or, in the alternative, for leave to appeal to the Court of Appeals from the decision and order of this court dated December 27, 2004.

Upon the papers filed in support of the motion and the papers filed in opposition thereto, it is

ORDERED that the motion is denied.

FLORIO, J.P., KRAUSMAN, GOLDSTEIN and MASTRO, JJ., concur.

ENTER:

/s/ James Edward Pelzer
James Edward Pelzer
Clerk of the Court

October 3, 2006

Supreme Court of the State of New York
Appellate Division: Second Judicial Department

M43034
S/sl

ANITA R. FLORIO, J.P.
GABRIEL M. KRAUSMAN
GLORIA GOLDSTEIN
WILLIAM F. MASTRO, JJ.

2000-10282

Alice Laraine Dimery,
appellant-respondent,
v Ulster Savings Bank,
respondent-appellant.

(Index No. 230/93)

DECISION & ORDER
ON MOTION

On the court's own motion, it is

ORDERED that its decision and order on motion dated March 28, 2005, in the above-entitled case is recalled and vacated, and the following decision and order on motion is substituted therefor:

Motion by the *appellant-respondent* for leave to reargue an appeal from a judgment of the Supreme Court, Putnam County, entered October 26, 2000, which was determined by decision and order of this court dated December 27, 2004, or, in the alternative, for leave to appeal to the Court of Appeals from the decision and order of this court.

Upon the papers filed in support of the motion and the papers filed in opposition thereto, it is

ORDERED that the motion is denied, with $100 costs.

FLORIO, J.P., KRAUSMAN, GOLDSTEIN and MASTRO, JJ., concur.

ENTER:

/s/ James Edward Pelzer
James Edward Pelzer
Clerk of the Court

August 8, 2006

State of New York,
Court of Appeals

At a session of the court, held at Court of Appeals hall in the City of Albany on the seventeenth ***day of*** November 2005

Present, HON. JUDITH S. KAYE, *Chief Judge, presiding.*

2-14 Mo. No. 871

Alice Laraine Dimery,
Appellant,

v.

Ulster Savings Bank,
Respondent.

A motion for reargument of motion for leave to appeal to the Court of Appeals in the above cause having been heretofore made upon the part of the appellant herein, papers having been submitted thereon and due deliberation having been thereupon had, it is

ORDERED, that the said motion be and the same hereby is denied.

/s/ Stuart M. Cohen
Stuart M. Cohen
Clerk of the Court

State of New York,
Court of Appeals

At a session of the court, held at Court of Appeals hall in the City of Albany on the sixth ***day of*** July 2005

Present, HON. JUDITH S. KAYE, *Chief Judge, presiding.*

2-14 Mo. No. 527

Alice Laraine Dimery,
Appellant,

v.

Ulster Savings Bank,
Respondent.

A motion for leave to appeal to the Court of Appeals in the above cause having heretofore been made upon the part of the appellant herein and papers having been submitted thereon and due deliberation having been thereupon had, it is

ORDERED, that the said motion be and the same hereby is denied.

/s/ Stuart M. Cohen
Stuart M. Cohen
Clerk of the Court

Supreme Court of the State of New York
Appellate Division: Second Judicial Department

M23288
E/sl

ANITA R. FLORIO, J.P.
GABRIEL M. KRAUSMAN
GLORIA GOLDSTEIN
WILLIAM F. MASTRO, JJ.

2000-10282

Alice Laraine Dimery,
appellant-respondent,
v Ulster Savings Bank,
respondent-appellant.

(Index No. 230/93)

DECISION & ORDER
ON MOTION

Motion by the respondent-appellant for leave to reargue an appeal from a judgment of the Supreme Court, Putnam County, entered October 26, 2000, which was determined by decision and order of this court dated December 27, 2004, or, in the alternative, for leave to appeal to the Court of Appeals from the decision and order of this court.

Upon the papers filed in support of the motion and the papers filed in opposition thereto, it is

ORDERED that the motion is denied, with $100 costs.

FLORIO, J.P., KRAUSMAN, GOLDSTEIN and MASTRO, JJ, concur.

ENTER:

/s/ James Edward Pelzer
James Edward Pelzer
Clerk of the Court

March 28, 2005

Supreme Court of the State of New York
Appellate Division: Second Judicial Department

D5297
C/cf

___AD3d___ Argued – December 9, 2004

ANITA R. FLORIO, J.P.
GABRIEL M. KRAUSMAN
GLORIA GOLDSTEIN
WILLIAM F. MASTRO, JJ.

2000-10282 DECISION & ORDER

Alice Laraine Dimery,
appellant-respondent,
v Ulster Savings Bank,
respondent-appellant.

(Index No. 230/03)

Paul B. Bergins, White Plains, N.Y., for appellant-respondent.

Thacher Proffitt & Wood, LLP, New York, N.Y. (Joel B. Harris and John P. Doherty of counsel), for respondent-appellant.

In an action, inter alia, for an accounting, which was consolidated with a summary holdover proceeding to recover possession of and to evict the plaintiff from the subject premises, the plaintiff appeals from stated portions of a judgment of the Supreme Court, Putnam County (Hickman, J.), entered October 26, 2000, which, after, among other things, a nonjury trial, dismissed the complaint and is in favor of the defendant on its counterclaims, and awarded the defendant damages representing unpaid rent and taxes for the plaintiff's occupancy of the

subject premises after termination of the parties' joint venture agreement for the period from April 1, 1991, through October 1, 2000, and the defendant cross-appeals from the same judgment.

ORDERED that the cross appeal is dismissed as abandoned, for failure to prosecute same in accordance with the rules of this court (*see* 22 NYCRR 670.8[c][e]); and it is further,

ORDERED that the judgment is modified, on the law, by deleting therefrom (1) the eleventh decretal paragraph, awarding the defendant damages representing unpaid rent for the period from April 1, 1991, through October 1, 2000, and (2) the fourteenth decretal paragraph, awarding the defendant damages representing unpaid taxes for the period from April 1,1991, through October 1, 2000; as so modified, the judgment is affirmed insofar as appealed from, without costs or disbursements.

The trial court's conclusion that the March 1, 1985, agreement between the parties did not constitute a reinstatement of the plaintiff's mortgages was based on a fair interpretation of the evidence (*see Donati v Marinelli Constr. Corp.*, 247 AD2d 423; *Booth v Landau*, 103 AD2d 733; *Corcillo v Martut, Inc.*, 58 AD2d 617, *affd* 45 NY2d 878; Real Property Law § 320).

However, under the circumstances of this case, the trial court erred in awarding the defendant damages representing unpaid rent and taxes for the plaintiff's occupancy of the subject premises after termination of the parties' joint venture agreement. The defendant's petition in the summary holdover proceeding sought to recover possession of the subject premises and did not request an award of damages for unpaid rent or taxes, and the defen-

dant's counterclaim in the consolidated action requested damages only as a form of alternative relief in the event that it was not awarded possession of the premises and a warrant of eviction (*see Port Chester Hous. Auth. v Turner*, 189 Misc 2d 603; *Fisher Ave. Realty Partners v Hausch*, 186 Misc 2d 609). Moreover, the defendant never sought to collect rent or taxes from the plaintiff, and did not raise this issue at trial (*see Hammerstein v Henry Mtn. Corp.*, 11 AD3d 836).

FLORIO, JP., KRAUSMAN, GOLDSTEIN and MASTRO, JJ., concur.

2000-10282

Alice Laraine Dimery,
appellant-respondent,
v Ulster Savings Bank,
respondent-appellant.

(Index No. 230/03)

DECISION & ORDER
ON MOTION

Motion by the respondent-appellant on an appeal and cross appeal from a judgment of the Supreme Court, Putnam County, entered October 26, 2000, to strike stated portions of the appellant respondent's brief on the ground that it refers to matter dehors the record. By decision and order on motion of this court dated September 27, 2004, the motion was held in abeyance and referred to the Justices hearing the appeal for determination upon the argument or submission thereof.

Upon the papers filed in support of the motion and the papers filed in opposition thereto, and upon the argument of the appeal, it is

ORDERED that the motion is denied.

FLORIO, J.P., KRAUSMAN, GOLDSTEIN and MASTRO, JJ., concur.

ENTER:

/s/ James Edward Pelzer
James Edward Pelzer
Clerk of the Court

December 27, 2004

SUPREME COURT OF THE STATE OF NEW YORK
APPELLATE DIVISION:
SECOND JUDICIAL DEPARTMENT

4043G
S/mm

CORNELIUS J. O'BRIEN, J.P.
GABRIEL M. KRAUSMAN
ANITA R. FLORIO
DANIEL F. LUCIANO, JJ.

2000-10282

Alice Laraine Dimery,
appellant,
v Ulster Savings Bank,
respondent.

DECISION & ORDER
ON MOTION

Motion by the appellant to stay enforcement of a judgment of the Supreme Court, Putnam County, dated October 26, 2000, and a warrant of eviction of the same court dated November 28, 2000, pending hearing and determination of an appeal from the judgment.

Upon the papers submitted in support of the motion and the papers submitted in opposition thereto, it is

ORDERED that the motion is denied.

O'BRIEN, J.P., KRAUSMAN, FLORIO and LUCIANO, JJ., concur.

ENTER:

James Edward Pelzer
Clerk

January 5, 2001

SUPREME COURT OF THE STATE OF NEW YORK
APPELLATE DIVISION:
SECOND JUDICIAL DEPARTMENT

2829G
Y/mm

DAVID S. RITTER, J.P.
GLORIA GOLDSTEIN
HOWARD MILLER
NANCY E. SMITH, JJ.

2000-08482

Alice Laraine Dimery,
appellant-respondent,
v Ulster Savings Bank,
respondent-appellant.

DECISION & ORDER
ON MOTION

Motion by the appellant-respondent to stay all proceedings in the above-entitled action, pending hearing and determination of an appeal and cross appeal from a decision of the Supreme Court, Putnam County, dated May 19, 2000.

Upon the papers submitted in support of the motion and the papers submitted in opposition thereto, it is

ORDERED that the motion is denied; and it is further,

ORDERED that on the court's own motion, the appeal is dismissed, without costs or disbursements, as no appeal lies from a decision (*see*, *Schicchi v Green Constr. Corp.*, 100 AD2d 509).

RITTER, J.P., GOLDSTEIN, H. MILLER and SMITH, *JJ.*, concur.

ENTER:

James Edward Pelzer
Clerk

November 17, 2001

Procedural Posture Judgment
case Index No.230/93[1]

Index No. 230/93 *Dimery v. Ulster Savings Bank*

Judgment of the Supreme Court of the State of New York County of Putnam dated and entered October 26, 2000 states on face under Procedural Posture:

"WHEREAS, from December 13, 1999 to January 7, 2000, trial was held in this matter

Decision and Interim Order

WHEREAS, the Court rendered a decision and interim order dated May 19, 2000 ("Decision and Order") in which the Court directed the parties to prepare an accounting consistent with the rulings contained therein;

WHEREAS, the Court issued a memorandum to the parties dated August 29, 2000 in which the Court provided additional guidance with respect to the preparation of the accounting;

WHEREAS, on or about September 6, 2000, the Court held a conference wherein the Court provided further guidance with respect to the preparation of the accounting;

IT IS NOW,

Dimery's Summons and Complaint

ORDERED, ADJUDGED AND DECREED, that Dimery's summons and complaint, verified February 10,

---

[1] Complete Judgment is filed in Appendix 9-55 Petition No. 05-1063

1993, is dismissed with prejudice in the captioned action. . . .

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF PUTNAM

---------- X

ALICE LARAINE DIMERY,
Plaintiff,

– against –

ULSTER SAVINGS BANK,
Defendant.

---------- X

DECISION & ORDER

Index No. 230/93

Motion Date 4/6/93

HICKMAN, J.

Motion by plaintiff Alice Laraine Dimery ("Dimery") staying and enjoining defendant from proceeding with a summary proceeding pending in the Justice Court, Town of Putnam Valley between the parties herein and also consolidating the summary proceeding with the instant action.

Plaintiff's Order to Show Cause contains a temporary stay of the summary proceeding and enjoins defendant from taking any other action to effect possession of the subject real property.

Defendant Ulster Savings Bank ("Ulster") cross-moves for an order pursuant to CPLR 3211(a)(4) and (5) dismissing the instant action on the grounds of another action pending and the statute of limitation, respectively, or, in the alternative, for an order pursuant to CPLR 6312(b) directing plaintiff to post an undertaking in the sum of $250,000 and pursuant to CPLR 6401(a) appointing a receiver of rents and expenses.

Since 1) the other action between the parties is a summary proceeding in a local Justice Court, 2) there is an issue presented as to the nature of the underlying relationship between the parties based upon their Agreement dated March 1, 1985, 3) summary judgment is neither sought nor would it be appropriate at this time and 4) the Justice Court cannot render a determination if the parties are in fact not a landlord and tenant, then Ulster's motion, to the extent it seeks dismissal based upon the pending Justice Court proceeding, must fail.

The Court also denies Ulster's second basis for dismissal, the statute of limitations, without prejudice and with leave to renew following the completion of discovery.

Plaintiff demonstrates that both a stay of the Justice Court proceeding as well as consolidation of that proceeding with the instant action, which seeks equitable relief in the nature of, *inter alia*, an accounting and constructive trust, are warranted and plaintiff's motion is granted.

Under the circumstances presented, the Court finds that the appointment of a receiver is unwarranted. Plaintiff must, however, post an undertaking with the County Clerk within twenty (20) days of the entry date of this order in the sum of $200,000.

Defendant's cross motion is granted to the limited extent in accordance with the foregoing.

The Clerk of the Justice Court of the Town of Putnam Valley is directed, within seven (7) days after service of a copy of this order with notice of entry, to transmit the file in the proceeding entitled "Ulster Savings Bank v. A. Laraine Dimery", to the County Clerk of the County of Putnam.

The Court has considered all submissions.

No further motions, other than as referred to in the body of this decision, may be made without the prior permission of the Court.

Counsel are directed to appear for a preliminary conference at the Putnam County Office Building, 40 Gleneida Avenue, Carmel, New York, at 9:30 a.m. on Wednesday, August 4, 1993.

So Ordered.

/s/ S. Barrett Hickman
S. BARRETT HICKMAN, J. S. C.

DATED: June 18, 1993
Carmel, New York

TO: ✓ VICTOR G. GROSSMAN, ESQ.
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✓ TED H. FINKELSTEIN, ESQ.
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October 12, 2000

Via Federal Express

The Honorable S. Barrett Hickman
Supreme Court of New York
County of Putnam
40 Gleneida Avenue
Carmel, New York 10512

Re: Dimery v. Ulster Savings Bank
Index No.: 230/93
Our Ref. No.: 16038-00101

Dear Judge Hickman:

Our firm represents defendant Ulster Savings Bank (the "Bank") and, in anticipation of the conference with Your Honor scheduled for October 20, 2000, I enclose a proposed Judgment in the referenced matter. The proposed Judgment refers to and incorporates three accountings. The first accounting, entitled "Joint Venture Accounting 12/18/84-10/1/00," is the overall joint venture accounting. The second accounting, entitled "Rent Due to USB from Ms. Alice Dimery 4/1/91-10/1/00," sets forth the amount of unpaid rent that plaintiff owes the Bank. The proposed Judgment and the accountings were prepared in accordance with the Decision and Order dated May 19, 2000, Your Honor's memorandum to the parties dated

August 29, 2000. and Your Honor's instructions at the parties' conference on September 6, 2000. On October 10, 2000, I sent these accountings to plaintiff's counsel, Bill Ingersoll, by facsimile.

The proposed Judgment also refers to a third accounting, entitled "Taxes Paid By USB on Lakefront Property, 1991-10/1/00." The Decision and Order held that plaintiff "owned a separate lakefront parcel which was never a part of the dealings with the bank." a 20 by 34 foot parcel between South Lake Boulevard and Lake Mahopac. *See Id.* at 26. Since at least 1991, the Bank – unaware that it did not own the property – has paid the taxes on the property. (We enclose copies of the relevant tax bills addressed to the Bank marked "paid.") The Bank therefore should be reimbursed for these payments by plaintiff, given that plaintiff did not make any (duplicate) tax payments on the property. The third accounting sets forth these payments.

Respectfully submitted,

/s/ John P. Doherty
John P. Doherty

cc by Federal Express: William J. Ingersoll, Esq. (w/ encl.)